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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	85478497
Applicant	NTA Enterprise, Inc
Applied for Mark	MARSHLAND
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re:	MARSHLAND and design	:	Trademark Application
Serial No.	85/478,497	:	
Filed:	November 22, 2011	:	Examiner: John M. Wilke
		:	

APPEAL BRIEF

1. The applicants disagree with the examiner's stated rejections for the reasons already of record which are repeated herein. This response will highlight the most critical of these issues.

The record clearly indicates that there is no likelihood of confusion between the applicants mark MARSHLAND and design. "Fabrics for the commercial manufacture of Camouflage articles by commercial manufacturers; Textile fabrics for the commercial manufacture of clothing by commercial manufacturers; Textile fabrics for use in the commercial manufacture of garments, bags, jackets, gloves, and apparel by commercial manufacturers; Camouflage fabric for use as a textile in the commercial manufacture of hunter clothing and hunter accessories by commercial manufacturers" and the marks MARSHLANDER and MARSHLANDER and design in U.S. Registration Nos. 3162449 and 1935600 for "Rain coats; Rain jackets; Rain suits; Rain trousers; Rainwear; Waterproof jackets and pants" (3162449), and "Weatherproof and waterproof rainwear." (1935600)

The record is clear that the will not confuse people that the goods they identify come from the same source.

TRADE CHANNELS

The cited registration relates to consumer goods, namely Rain coats; Rain jackets; Rain suits; Rain trousers; Rainwear; Waterproof jackets and pants" (3162449), and "Weatherproof and waterproof rainwear." (1935600). The applicant's goods as defined in the registration relate to a portion of the industry DISTINCTLY removed from the ultimate consumer. The channel of trade for these goods are set forth in the

description of good namely "Fabrics for **the commercial manufacture of Camouflage articles by commercial manufacturers**; Textile fabrics for **the commercial manufacture of clothing by commercial manufacturers**; Textile fabrics for use in the **commercial manufacture of garments, bags, jackets, gloves, and apparel by commercial manufacturers**; Camouflage fabric for use as a textile **in the commercial manufacture of hunter clothing and hunter accessories by commercial manufacturers**." It is the commercial manufacturers that are buying a fabric line that will be incorporated into the identified clothing items. The individual clothing items will be sold under the retailers branding to the consumers.

The examiner counters this argument stating that this identification of the distinct channel of trade "does not change the fact that applicant's fabrics could be used in the "commercial" manufacture of applicant's clothing." This is not understood as the applicant is not manufacturing clothing but rather is selling fabric; it is the commercial manufacturers that are the applicant's customers. There is absolutely no circumstance that the applicant's defined goods will be marketed to the defined market of commercial manufacturers that would give rise to the mistaken belief to these consumers that the goods come from a common source as the raingear of cited registrations as the cited registrations are clearly never to be marketed to such commercial manufacturers.

The examiner seems to rest the argument that the applicants mark can continue downstream into the same market as the supplied registrations. This argument is ignoring the applicant's defined channel of trade as set forth in the goods and description and expanding the mark to include all uses of the goods by third parties and such expansion is improper and misplaced. The nature and scope of a party's goods or services must be determined on the basis of the goods or services recited in the application or registration. *See, e.g.*, *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1370, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012); *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 1267, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002); *J & J Snack Foods Corp. v. McDonald's Corp.*, 932 F.2d 1460, 1463, 18 USPQ2d 1889, 1892 (Fed. Cir. 1991); *Octocom Sys., Inc. v. Houston Computer Servs., Inc.*, 918 F.2d 937, 942, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990); *Canadian Imperial Bank of*

Commerce, N.A. v. Wells Fargo Bank, 811 F.2d 1490, 1493, 1 USPQ2d 1813, 1815 (Fed. Cir. 1987); *Paula Payne Prods. Co. v. Johnson Publg Co.*, 473 F.2d 901, 902, 177 USPQ 76, 77 (C.C.P.A. 1973); *In re Giovanni Food Co.*, 97 USPQ2d 1990, 1991 (TTAB 2011); *In re Iolo Techs., LLC*, 95 USPQ2d 1498, 1500 (TTAB 2010).

It seems the examiner acquiesces that the applicant's use of the mark will cause no likelihood of confusion with any cited registration, and this should be enough for registration.

The examiner is attempting to base refusal on some remote potential third party usage, which itself is not fairly supported by the record. The examiner asserts that "it is common practice for commercial manufacturers to identify the brand of fabric used in making the clothing items to customers." However this is simply not the case as evidenced by the record. Clothing manufacturers that utilize a material having a special property can sometimes use the brand names (with permission) of these to advertize the properties such as the example of a tough breathable industrial material TyVek® brand material cited by the examiner or the breathable membrane GORE-TEX® also cited by the examiner. Other suitable examples include THINSULATE® or INSULTEX® for insulating material. In contrast with these special property examples, the particular printed pattern branding or general fabric material (e.g. cotton, polyester blend, silk, etc) branding, thread branding, zipper branding, button branding is generally NOT carried downstream by commercial clothing manufacturers. Thus even if third party uses of the applicant's mark were relevant the evidence here suggests that the applicant's mark, not being directed to a fabric with special properties, would not make it downstream beyond the applicant's channels of trade to the consumers of the cited registrants goods. It is again noted that the basis of the examiner's argument is to disregard and expand the applicant's defined channels of trade and such is inappropriate.

The examiner notes that the overriding concern is not only to prevent buyer confusion as to the source of the goods and/or services, but to protect the registrant from adverse commercial impact due to use of a similar mark by a newcomer. *See In re Shell Oil Co.*, 992 F.2d 1204, 1208, 26 USPQ2d 1687, 1690 (Fed. Cir. 1993). The refusal should be withdrawn on both counts here. The distinct channels of trade of the

applicants defined goods and the registrant's defined goods prevent buyer confusion as to the source of the goods, as the two will never see the same buyer as defined. Further as the registrant does not sell raingear to commercial manufacturers there can be no adverse commercial impact with the applicant's registration.

CONSUMER SOPHISTICATION

The identified goods are "Fabrics for **the commercial manufacture of Camouflage articles by commercial manufacturers**; Textile fabrics for **the commercial manufacture of clothing by commercial manufacturers**; Textile fabrics for use in the **commercial manufacture of garments, bags, jackets, gloves, and apparel by commercial manufacturers**; Camouflage fabric for use as a textile **in the commercial manufacture of hunter clothing and hunter accessories by commercial manufacturers**." It is these customers that must be considered. In this context these are extremely highly sophisticated customers that are keenly aware of trademarks, as this is a critical part of their business. The consumer sophistication of the IDENTIFIED GOODS cannot be dismissed by the examiner.

THE NATURE AND EXTENT OF ANY ACTUAL CONFUSION AND THE LENGTH OF TIME OF CONCURRENT USE WITHOUT EVIDENCE OF CONFUSION.

Clearly once both marks have been in use in commerce for some time, then pertinent DuPont factors are the nature and extent of any actual confusion. As the record reflects the applicant's have used the mark for the identified goods for several full clothing seasons. Over several full seasons of use is a substantial amount of time, particularly in the retail clothing fields as this time exceeds the average lifespan of many clothing product designs. There has been extensive concurrent use with the cited registration and there remains **absolutely no evidence** of actual confusion between the applicant's mark and the cited mark. The lack of ANY actual confusion, and there has been NO CONFUSION even of a de minimus nature, after considerable co-existance of the marks in commerce is the strong evidence that there is no likelihood of confusion between the applicant's mark and the cited registration.

The trademark office tends to give little weight to this factor in ex parte proceedings, but it cannot be given zero weight. It is truly unfortunate that the Office gives this factor so little weight when it is, in truth, the true test of the office position. The above arguments are persuasive support that there is no likelihood of confusion here while the fact that there has been no hint of confusion is the truest proof of such.

The evidence of record fails to support the examiners assertions and reversal of the examiner is respectfully requested.

Respectfully submitted,

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